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LIMITED-ACCESS HIGHWAYS AND PUBLIC
UTILITY USER

By ROBERT P. GARBARINO †

THE LOGICAL PLACE for electric wires and telephone wires, the traditional place, has been parallel to the street and the highways; perhaps in the city under the carriageway in a cable conduit; and in the country on poles alongside the right of way. The use of the same right of way for roads and for utilities minimizes injury to property values, simplifies and reduces the cost of condemnation, and provides ready access to utility installations for maintenance and repair. In less degree there are similar advantages for water and gas pipes. By and large, the roads go where people will need utilities. By and large, the routes most suitable for roads are most convenient for utilities, in directness, in facility of construction, in obstacle avoidance, and in service to the people to be benefited. The question this Article will treat is the accommodation of the new limited-access highways to the traditional and logical public utility user. To what extent will utilities be permitted to build on these highways and to use them for service of their facilities?

The problem was raised sharply in recent hearings before the Senate Subcommittee on Public Roads. Testifying before the Subcommittee with respect to the recently enacted Federal-Aid Highway Act,¹ Secretary of Commerce Sinclair Weeks expressed the view that unrestricted utility occupancy of the new highways is inconsistent with the standards of access control upon which they are designed.

The Secretary spoke in terms of legislation, but it is anticipated that federal action on this question will take the customary form of regulations issued by the Commerce Department, subject to the 30-day period for objection and suggestion under the Administrative Procedure Act.² At least it is clear that the Secretary has such power.³

Such new federal regulations would have an immediate and important impact on state regulation of highway user by utilities. The

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1. FEDERAL-AID HIGHWAY ACT OF 1958, PUB. L. No. 85-381.

2. 5 U.S.C. § 1003(a), (b) and (c) (1952).

3. 23 U.S.C. § 19, as amended, 23 U.S.C. § 156(e) (1952).

Commerce Department cannot control state regulations directly, but it can require compliance as a condition of the federal grant, which may run as high as 90 per cent of the construction cost and even higher in states having public-owned lands.⁴ And, it may be expected that the regulations will follow and expand upon the Secretary's remarks.

It is the purpose of this article to investigate the implications of these remarks and to compare the results with existing state laws in order to determine what amendments or additions to state law the federal regulations might require.⁵ The coverage will be nationwide, with some emphasis on Pennsylvania as a typical state.

There are three types of statutes which are potentially controlling on the question of utility user of public highways:

1. Comprehensive highway occupation and regulatory schemes usually found in state constitutions and highway acts;
2. State enabling statutes accepting the conditions of federal aid; and
3. Controlled-access highway legislation.

The various statutes will be examined in this order.

It should be kept in mind that state regulations more stringent than the federal regulations need not be changed, unless the more liberal federal rule is viewed for one reason or another as an affirmative mandate. In most cases this latter problem will not arise since the question will be only whether existing state laws can satisfy the federal conditions without amendment or supplement.

The reader may be unfamiliar with the legal status of our highway system.⁶ The United States has no national system such as is often found in other countries. The only roads built and maintained wholly by the federal government are some 70,000 miles of national forest, national park, and Indian reservation roads. All the rest of our roads are owned and maintained either by the states or by political subdivisions of the states.

Some important roads and streets bear the "U. S." shield, but this is only a national numbering device for the convenience of travelers rather than an indication of exclusive federal maintenance or ownership.

4. 23 U.S.C. § 158(e) (1952).

5. This article will not examine the equally important and allied question of state and federal laws governing reimbursement for utility relocation costs occasioned by highway improvements. For example, see 23 U.S.C. § 162 (1952).

6. For a comprehensive and informative analysis of this subject, see TYLER, *AMERICAN HIGHWAYS TODAY* (1957), Vol. 29, No. 1 of The Reference Shelf.

The federal government does give aid for state highways. The federal-aid system divides state highways into four classes: the primary system, including the more important rural highways; the secondary or farm-to-market roads; the urban system which is made up primarily of city streets which connect to state highway routes either passing through or adjacent to the cities and are extensions of the primary and secondary roads within urban areas; and the class with which this article is concerned, the National System of Interstate Highways, which are part of the primary system and whose routes are selected jointly by the states and by the Bureau of Roads of the Commerce Department. The Interstate System covers only one and two-tenths per cent of our highways, but it embraces substantially all the heavily-traveled, high-speed highways, and these are the highways with which Secretary Weeks' remarks were concerned, because of the safety and convenience problems they raise.⁷ The need for regulating utility installations along other roads is much less, and the discussion here is not meant to be applied to them.

The question of utility occupancy of highways posed few problems for either highway planners or utilities until recent years. The first important controlled-access highway was the 1939 western section of the Pennsylvania Turnpike. Before the limited-access principle could be widely adopted, the war intervened and terminated new-highway construction for the duration. But with the end of the war it was widely felt that a gigantic national highway program was needed to meet the strain to be placed on the neglected existing highways by the tremendous demand for new, bigger and faster automobiles. The emphasis was not on local service roads but on high-speed through highways incorporating new design and construction features. Automobile registrations increased from thirty-two million in 1940 to approximately sixty-seven million in 1957.

The controlled-access principle was soon widely accepted.⁸ Studies showed that accidents could be reduced though speeds were raised. But this meant that intersecting streets, driveways, and railroad crossings must be eliminated. Traffic must be gradually channelled on and off the roadway at a limited number of ingress and egress points. And, "ribbon development,"⁹ roadside hot dog stands, motels, miniature golf courses, and the like must be barred.

7. *Ibid.*

8. LEVIN, PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT 1-98 (1947).

9. *Id.* at 90; HUBER, CONTROL OF ACCESS TO ROADS AND STREETS 96-102 (1955), Proceedings of the Fortieth Annual Highway Conference, Grand Rapids, Michigan.

At first there was no effort to exclude utility facilities since they were not the source of the basic problem. In many areas, utilities removed their parallel poles and substituted underground installations.¹⁰ However the installations continued to be located longitudinally along the roads outside the shoulder areas, and the utilities continued to use the roads to service these installations.

It was with this aspect of occupancy that the Secretary took issue. He felt that, on roads with speeds ranging from fifty miles per hour in urban and mountainous areas to sixty in rolling country to seventy in flat country, even this limited amount of conflict was hazardous. He took the position that the use of the main roadway as a service road involved the same dangers as the use of a driveway along the road. However, he did recognize that these service trucks are performing a public function while the private car in the driveway is not.

Are the existing Commerce Department regulations adequate to the new needs? The answer is no; new regulations are needed. The only applicable ones implement two provisions of the federal highway law¹¹ to the effect that the rights of way for federal-aid highways shall be exclusively for highways and that no signs, other than traffic signs, no billboards, roadside stands or other private installation for serving the motorist shall be permitted within the right-of-way limits. Such provisions are obviously addressed to "ribbon development" and were neither intended by Congress nor construed by the Department to apply to utility facilities.

Each state had regulatory provisions which they adopted to their own particular situations. However, when the new thinking with respect to design standards became the order of the day some states looked to these federal provisions and interpreted them as being applicable, and ascribed to the Department a position which could hardly be sustained on either the state or federal level. Other states, recognizing that the existing federal regulations were inapplicable, simply utilized their customary state regulations. In a word, regulation of utility installations differed from state to state. Visualizing the need for standardization and a fixed policy geared to 1975 requirements, as well as the public need for utilities, the Secretary has made the following proposal:

"I also feel that Congress should give consideration to the problem of whether and the extent to which utility facilities should be permitted to occupy the rights-of-way of highways on the

10. There are no poles along the Pennsylvania Turnpike, but utility facilities are located in the off-shoulder areas and cross the pike without causing any safety hazards over the years in which they have been so located. See PA. STAT. ANN. tit. 36, § 625(1). (1952).

11. 23 U.S.C. § 163; 23 FED. REG. 387, 390 (1951).

Interstate System. The geometric and construction standards adopted for the Interstate System provide for highway design speeds of at least 70 miles per hour for flat terrain, 60 miles per hour for rolling terrain, and 50 miles per hour in mountainous and urban areas. The standards provide for control of access, complete elimination of railroad grade crossings, and the elimination of virtually all other crossings and intersections as well as other provisions deemed essential for the safe, efficient, and rapid movement of traffic. The installation of utility facilities within the rights-of-way of highways constructed to such standards, and particularly the utilization of the main traveled way of such highways as a service road for the installation, maintenance and repair of utility facilities are inconsistent with the purposes for which such standards were adopted. We have given considerable thought to this problem recently, and feel strongly that a policy should be adopted which would preserve the safety features contemplated for the Interstate System, and at the same time to make such necessary provisions for the utilities as are not inconsistent with this objective. We are now considering the preparation of draft legislation on this subject."¹²

In the light of this statement it would appear that any proposed regulations enacted within that policy framework would proceed along the following lines:

1. They would apply only to the Interstate System and would be prospective.
2. They would be geared primarily to prohibitions against utilization of the main traveled portion of the roadway as a service road for adjacent utility facilities.
3. They would recognize the need for utility installation in the right-of-way to some reasonable extent in order to carry out their statutory duty to serve the public.
4. They would limit this occupancy to the extent that it would conflict with the future design standards of access control of the Interstate System.
5. They would apparently permit underground and overhead crossing of the Interstate System so long as such facilities could be serviced from manholes outside the roadway and without utilizing the roadway as a service road.
6. They would permit the servicing of traffic lights and street lighting from the main traveled way.
7. Utility facilities such as poles paralleling the roadway and constituting adjacent obstacles to passing traffic would be pro-

12. *Hearings before Subcommittee on Public Roads*, on S. 2939, S. 3033, S. 3088, S. 3150, S. 3220, S. 3414, and S. 3429, 85th Cong., 2d Sess. at 5 (1958).

hibited. (This has frequently been required in toll road and parkway construction by the states.)

8. Utility facilities located within the right-of-way but outside the shoulder area which could be serviced from parallel roads other than the main roadway would not appear to conflict with access control and hence would probably be permitted. To prohibit this sort of occupancy would be tantamount to complete exclusion and hence raise serious legal questions at both the state and federal level.

Finally, although no mention of this was made by the Secretary, it would appear that some sort of provision will have to be made for the "hard case" where the main way must be utilized as a service road if adequate utility service to customers is to be rendered. Again, this would avoid any questions of unreasonableness.

In the light of this prognosis, the three primary types of potentially applicable legislation and constitutional provisions will be examined.

I.

COMPREHENSIVE HIGHWAY OCCUPATION AND REGULATORY PROVISIONS.

Of the three types of state law here involved this type is the oldest and best established. It dates back to the 1800's when the utility era began. The enabling provisions for utility installations take either the form of constitutional provisions or statutes or both. Every state of the union as well as the District of Columbia, Hawaii and Puerto Rico has made some statutory provision for the installation of utility facilities in its primary system of state highways.¹³ In addition, constitutional provisions relating to this same subject are found in eighteen states.¹⁴

With the exception of Oklahoma all of these constitutional provisions provide for utility installations in the streets and highways of the state in general, rather than limiting that right to state highways. This is perfectly logical when it is realized that most of these constitutional provisions were enacted before anyone gave any serious consideration to the designation of highway types, and before the advent of the first state highway departments. All eighteen of these constitutional enactments provide for street railway occupancy, and nine of them provide for this type of utility only. Hence, in the latter cases non-rail utilities must look to statutory provisions for their right to enter upon the streets and highways with their facilities.

13. See HIGHWAY RESEARCH BOARD SPECIAL REPORT 21, RELOCATION OF PUBLIC UTILITIES DUE TO HIGHWAY IMPROVEMENT, at 41-84, and Appendix A (1955). The Appendix of this report provides citations and text of all state laws.

14. *Id.* at Appendix A.

Most of these constitutional provisions have a regulatory feature attached to them with respect to initial occupancy, which requires the consent of the local governing body, rather than the state, prior to installation. Typically the cases construing such provisions have held that such consent may be withheld only because of conditions affecting public health, safety and welfare, and not for revenue-raising or exclusionary purposes.¹⁵ Consequently, any arbitrary or capricious withholding of consent is not condoned, and this power which at first sight would appear to be plenary, and hence could easily meet any federal conditions, is not so broad in the clear light of the decisions. And correctly so. How incongruous it would be to empower the utilities to utilize the streets and highways to serve the public and then in the same statutory or constitutional breath give a local political subdivision or the state the power to exclude them on the basis of unreasonable conditions attached to the grant of consent.

The courts recognizing these considerations set up a standard for the grant or refusal of consent based on the police power—which is really the elastic balancing of equities rule which recognizes the rights of the public as utility service consumers and as highway users, and thus can be easily adjusted to new conditions. In Michigan and Oklahoma the consent condition is broader and extends beyond the initial occupancy and provides that control over streets and highways shall remain with the appropriate governmental authority. Thus, in these two states the enabling constitutional provisions themselves provide for a method of regulation at the time of installation as well as continued regulation after initial installation.

The same general pattern of regulatory power is followed in the statutory enabling acts. In other words, there are reasonable consent provisions attached to initial occupancy as well as regulatory powers attaching after the initial consent has been granted and the facilities installed. For example, thirty-seven states provide that consent of the proper authority, usually the local political subdivision or the state highway department, must be obtained prior to occupying the highway right-of-way, at least with respect to certain specific types of utilities.¹⁶ In addition every state has made provision for reasonable regulation of utility facility locations after initial installation, at least with respect to specifically enumerated classes of utilities.¹⁷ In general, virtually every

15. For example, see *Central District & Printing Telegraph Co. v. Homer City*, 242 Pa. 597, 89 Atl. 681 (1914); *Dorrance v. Bristol Borough*, 224 Pa. 464, 73 Atl. 1015 (1909); *Farmers' Mutual Telephone Co. v. Middleboro Borough*, 25 Pa. Dist. Rep. 256 (C.P., Erie 1916).

16. See note 13 *supra* at Appendix A.

17. *Id.*

type of utility is covered by this variety of legislation. The typical phrase is that either all or certain specified utilities may occupy the highway "so long as they do not incommode the public use of the road or highway."¹⁸

A few of the states however, such as Arizona and Arkansas, although falling within the "incommode" group with respect to certain types of utilities, permit the occupation of highway rights-of-way by certain other utilities without imposing any restrictions whatsoever.¹⁹ This, however, is the unusual case and normally the "incommode" provisions are applicable to all utilities and tested by the balancing of equities, police power standard.

Thus, we may conclude that under one form of enactment or another (constitutional or statutory) all utilities are permitted to enter upon the streets and highways of the states with their facilities to varying degrees; and, with rare exceptions, all utilities are subject to reasonable regulation upon initial occupancy by virtue of the consent provisions, and after initial installation by virtue of the "incommode" provisions. In addition, most of the states have additional provisions addressed to the type of facility rather than to the type of utility, requiring permits prior to crossing highways and breaking the pavement and giving the appropriate body the right to attach reasonable conditions based on questions of health, safety and public welfare, but excluding revenue-producing or confiscatory measures in the granting of these permits.²⁰

This brings us to the important question of adaptation without amendment or supplement of these several classes of enactments to new federal regulations. The rule of reason which has been grafted to the consent provisions and the permit and "incommode" provisions is obviously highly elastic and hence easily adaptable to new situations and new problems. In each case the everyday application of this flexible standard involves a balancing of equities, between the utilities and the public road users. The greater the burden placed upon the utility and the smaller the public benefit the more likely the particular condition will be declared invalid. On the other hand, the greater the public

18. *Id.*

19. *Id.*

20. *Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460, 114 N.W. 588 (1908); *Valley Railways v. Harrisburg*, 280 Pa. 385, 124 Atl. 644 (1924); *Allegheny County Light Co. v. Booth*, 216 Pa. 564, 66 Atl. 72 (1907); *Hestonville, Mantua & Fairmount Passenger Railroad Co. v. Philadelphia*, 89 Pa. 210 (1879); *Edgewood Borough v. Scott*, 29 Pa. Super. 156 (1905); *Ridley Park v. Light and Power Co.*, 9 Pa. Super. 615 (1899); *Pennsylvania ex rel. Bard v. Philadelphia Electric Co.*, Equity No. 3, September Term (Mont. 1938); *State v. Benwood & McMechen Water Co.*, 94 W. Va. 724, 120 S.E. 918 (1923).

benefit and the less the burden the more likely the regulation will be held valid. In all cases the regulation will have to be for health, safety or public welfare purposes and will recognize the primary "easement" of travel.

Applying this reasoning to the regulations predicted by the writer it would appear that there is ample basis within these elastic provisions for adjustment to the federal conditions without any changes in state law. More than likely the only changes will be policy changes or changes in state regulations enacted under these provisions which will reflect compliance with the new federal conditions. Of course, this is predicated on the assumption that there will be no blanket exclusion from the off-shoulder right-of-way area when access can be obtained from other than the main way, as well as provision for "hard cases." Since the application of the new conditions appears to be prospective there is no problem of retroactivity.²¹ With respect to the removal of parallel poles there is already case law authority sustaining such regulation in given situations, such as along city streets, where the danger to public safety is great.²² In view of the high speeds anticipated on the Interstate System and the frequency with which utility poles are struck at present, it seems that such a regulation would be declared valid under the rule of reason. In fact, the utilities would probably agree with the imposition of this condition wholeheartedly except in unusual circumstances. With respect to the question of using the main way as a service road to off-shoulder facilities, such as high tension lines, the question is much closer. However, as long as some provision is made for the "hard cases" where there is no place to locate the facilities other than adjacent to the main way and where the only possible service entrance is from the main way, the federal prohibition could probably be accommodated under the noted test.

The "hard cases" are well illustrated by two vivid and not unusual examples. In Pennsylvania the new Section Nine portion of the Schuylkill Expressway, which is a part of the Interstate System, passes through the heart of urban Philadelphia. In the vicinity of Thirtieth Street the topography is as follows: On the west are the tracks of the Pennsylvania

21. *Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460, 114 N.W. 588 (1908); *Hedrick v. Graham*, 96 S.E.2d 129 (N.C. 1957); *Breinig v. Allegheny County*, 332 Pa. 474, 2 A.2d 842 (1938); *United Electric Light Co. v. East Pittsburgh*, 230 Pa. 65, 79 Atl. 229 (1911); *Allegheny County Light Co. v. Booth*, 216 Pa. 564, 79 Atl. 229 (1907); *Consolidated Telephone Co. of Pennsylvania v. Wilkes-Barre*, 34 C.C. 177 (Luz. 1907).

22. *Duquesne Light Co. v. Pittsburgh*, 251 Pa. 557, 97 Atl. 85 (1916); *Pennsylvania ex rel. Bard v. Philadelphia Electric Co.*, Equity No. 3, September Term (Mont. 1938). But see *Carver v. State*, 11 Ga. App. 22, 74 S.E. 556 (1912); *Plattsmouth v. Nebraska Tel. Co.*, 80 Neb. 460, 114 N.W. 588 (1908); *A.T. & T. Co. of Pennsylvania v. Mifflintown Borough*, 15 D & C 575 (C. P. Jun. 1930).

Railroad Company's Thirtieth Street Station. Immediately adjacent is the new roadway which parallels the tracks so closely that the construction of the expressway required the relocation of many of the supports for the railway electrification wires. To the east of the roadway is the Schuylkill River. The river is so close to the roadway that in some places the Expressway extends over the water's edge on cement piers. Obviously, the only way in which to service utility facilities located in this area is from the traveled way. To refuse access in such cases would appear to be unreasonable and hence it is doubtful that the proposed rules would not make provision for such a situation.

To complicate the situation further, in Pennsylvania utilities have the power to condemn only up to a point not less than three hundred feet from the dwelling house.²³ In an urban area this means that there is no effective power of condemnation. In addition, even if the power to condemn were present the costs in such a heavily populated, high cost area would be prohibitive.

Another example is typical of a situation which arises in a completely different setting. Here there is an abundance of land but the terrain is one of tremendous canyons bottomed by fast-moving rivers; the State of Colorado is a good example of such land. Anyone who has traveled in that area has seen how the high tension lines are constructed on the sides of sheer cliffs. Naturally on such terrain the highway and the utility installation both take the path of least resistance. Obviously, in such cases the main way must often be utilized for servicing purposes. To deny the utility that right in such cases is tantamount to a denial of utility service to customers in such areas. Again, it would be surprising if provision were not made for such situations in the proposed regulations. With that provision, as well as with the provision for installation in off-shoulder areas not serviced from the main roadway, there would then be no serious problem in adjusting existing state constitutional and statutory, comprehensive, highway-occupation schemes to the new regulations without amendment or supplement.

With that background in mind the Pennsylvania scheme and the cases construing it will be examined in detail, again from the standpoint of adjusting to the proposed federal policy already enunciated.

The Pennsylvania scheme follows the usual pattern but differs in some important details. In Pennsylvania there is no constitutional provision for occupancy nor is there any blanket enabling statute pro-

23. Electric utilities, for example, are given the power to condemn "except that . . . a dwelling house or the reasonable curtilage, not to be less than three hundred feet, appurtenant thereto, shall not be appropriated. . . ." PA. STAT. ANN. tit. 15, § 1182(b); *Charch v. Pennsylvania P.U.C.*, 183 Pa. Super. 371, 132 A.2d 894 (1957).

viding for all utilities. On the contrary, there are a host of individual enabling acts, dating back as far as 1857, covering the several types of utilities.²⁴ However, these statutes are virtually identical with respect to the powers conferred and the express limitations on such powers.²⁵

Pennsylvania, following the usual pattern, has both an initial consent feature and an "incommodious" feature. It differs, however, in this respect. The consent feature, which is a part of the enabling acts, does not apply to all installations. It is only applicable to installations in the streets and highways of boroughs and cities. The consent feature does not apply to state highways. The state has been given the power under a subject-matter statute to require permits prior to the making of any opening or crossing of any state highway, as well as the power to attach reasonable conditions to the grant thereof.²⁶ The Highway Department further has been given this same power by statute with respect to second-class township roads with the latter receiving a part of the permit fee bearing a reasonable relation to the cost of inspection.²⁷ The first-class townships have a power similar to the Departments with respect to its streets on the basis of their statutory police-power grants.²⁸ Together with their initial consent powers the cities and boroughs also have well-established, post-installation, regulatory powers based on their

24. For example, Water (1857), PA. STAT. ANN. tit. 15, § 1332 (1958); Gas (1857), PA. STAT. ANN. tit. 15, § 1331 (1958); Telephone and Telegraph (1874), PA. STAT. ANN. tit. 15, § 2292 (1958); Electric (1874), PA. STAT. ANN. tit. 15, § 1181 (1958).

25. The Electric Enabling Act, PA. STAT. ANN. tit. 15, § 1181 (1958), is typical and provides:

"Companies incorporated under the provisions of this act, for the supply of light, heat and power, or any of them, to the public by electricity shall from the date of the letters patent creating the same, have the powers and be governed, managed and controlled as follows:

"Every such corporation shall have the authority to supply light, heat and power, or any of them, by electricity, to the public . . . at such prices as may be agreed upon, and the power also, to make, erect and maintain the necessary buildings, machinery and apparatus for supplying such light, heat and power or any of them, and to distribute the same, with the right to enter upon any public street, lane, alley or highway for such purpose, to alter, inspect and repair its system of distribution. . . ."

And the consent feature provides:

"that no company which may be incorporated under the provisions of this act shall enter upon any street in any city or borough of this commonwealth until after the consent to such entry, of the councils of the city or borough in which such street may be located, shall have been obtained."

26. PA. STAT. ANN. tit. 36, § 670-411 (1958); *Commonwealth v. Funk*, 323 Pa. 390, 186 Atl. 65 (1936); *Philadelphia Suburban Water Co. v. Pennsylvania P.U.C.*, 168 Pa. Super. 360, 78 A.2d 46 (1951).

27. PA. STAT. ANN. tit. 53, § 66156 (Supp. 1958). See *Robinson Twp. v. The Bell Telephone Co.*, 61 D & C 483 (C.P. Ally. 1947).

28. PA. STAT. ANN. tit. 53, §§ 56557 and 57084 (1957).

respective police-power grants.²⁹ In addition, the courts by judicial decision have added an "incommode" provision to all of the already-mentioned powers.³⁰

There is considerable case law touching each of these provisions and essentially it amounts to this: the rule of reason guided by a balancing of equities controls in all cases. The applicable law has been well stated by Mr. Justice Stewart when he said in *Central Distributing & Printing Telegraph Co. v. Homer City Borough*:³¹

On consent:

" . . . the legislature did not contemplate that such consent would be withheld except for conditions affecting the public welfare. Any arbitrary or capricious withholding of its consent by borough authorities would not be justified."

And on regulations and conditions attached to consent:

"So too with respect to the imposition of conditions and regulations by the borough. If any be imposed, the law contemplates that they shall be reasonable and not arbitrarily imposed simply with the view to defeat their acceptance by the applying company."

Although that particular case dealt with a borough the same rules have been applied to state regulations on the theory that while the Commonwealth has changed its highway trustee from the smaller political subdivisions to the State Highway Department with respect to certain highways by taking back in 1911 many of the powers formerly conferred on the former, it did not alter the powers of the designated trustee.³² Accordingly, city, borough and county cases are cited interchangeably in State Highway Department decisions.³³

Hence, it is clear that the city and borough powers are grounded on the consent provisions of the several enabling acts and the statutory grant of police powers, and limited in scope by the police power rule of reason. The state's power, on the other hand, stems from its plenary

29. *Allegheny County Light Co. v. Booth*, 216 Pa. 564, 66 Atl. 72 (1907); *A.T. & T. of Pennsylvania v. Mifflintown Borough*, 15 D & C 575 (C.P. Jun. 1930).

30. *Peoples Telephone & Telegraph Co. v. Turnpike Road*, 199 Pa. 411, 49 Atl. 284 (1901).

31. 242 Pa. 597, 89 Atl. 681 (1914).

32. *Breinig v. Allegheny County*, 332 Pa. 474, 2 A.2d 842 (1938); *Bell Telephone Co. v. Lewis*, 317 Pa. 387, 177 Atl. 36 (1935); *Westmoreland Chemical & Color Co. v. Public Service Commission*, 294 Pa. 451, 144 Atl. 407 (1928); *Commonwealth ex rel. Reno v. Heidelberg Twp. Water Co.*, 48 D & C 511 (C.P. Dauph. 1943).

33. See, for examples, *Dept. of Highways v. Pennsylvania P.U.C.*, 185 Pa. Super. 1, 136 A.2d 473 (1957), *appeal allowed on other grounds*; *Commonwealth ex rel. Reno v. Heidelberg Twp. Water Co.*, 48 D & C 511, 517-519 (C.P. Dauph. 1943).

control over the highways as *parens patriae* and the police power.³⁴ Its powers are circumscribed by the statutory exercise of these powers and the statute itself is limited by the permissible scope of the police power. In other words the statutory exercise may be less than the permissible scope of the police power but never greater.

The "incommode" feature was first introduced in a 1901 decision.³⁵ In that case a utility had erected its poles along a turnpike road pursuant to its statutory authority. The turnpike company proceeded to cut down the poles and the utility sought an injunction. In granting the injunction, the court stated:

"Nothing is better established than that a turnpike road is a public highway, and every traveller has the same right to use it upon payment of the toll established by law as he would have to use any other public highway.

"The plaintiff company, therefore is authorized under the laws of the commonwealth to locate and construct a telephone line on the public highway . . ., and if located and constructed so as not to incommode the public use of said highway; the defendant company cannot be permitted to interfere with plaintiff in its constructed and operation as threatened."

This same principle has been affirmed as recently as 1957 in *Department of Highways v. Pennsylvania Public Utility Commission*³⁶ where the court stated:

"It has long been the policy of this Commonwealth, and most other states, to permit public utility companies to place their facilities upon highway rights-of-way, so long as such facilities do not interfere with the public use of the highways. See *Bell Telephone Company of Pennsylvania v. Lewis*, 317 Pa. 387, 177 A. 36 (1935). Use of the streets by the public utility companies is subject to the earlier and superior rights of the public. It has been held that the police power to control and regulate the highways *so as to protect the public health and safety* is one that cannot be bargained away by legislation or municipal grant. Such authority is both paramount and inalienable. *Scranton Gas and Water Co. v. Scranton*, 214 Pa. 586, 590, 591, 64 Atl. 84 (1906)." (Emphasis added.)

It is noteworthy that of the two cases cited in this quotation one involved State Highway Department powers and the other dealt with city powers and yet both were applied without distinction, in the cus-

34. *Commonwealth v. Funk*, 323 Pa. 390, 186 Atl. 65 (1936).

35. *Peoples Telephone & Telegraph Co. v. Turnpike Road*, 199 Pa. 411, 415, 49 Atl. 284 (1901).

36. 185 Pa. Super. 1, 136 A.2d 473 (1957).

tomary manner in Pennsylvania. Further note that the police regulatory powers held by the state are based on public health and safety and therefore any revenue-raising measures would not be tolerated.³⁷ When regulations are imposed, or conditions attached to the grant of permits they must be reasonable and related to the public health and safety.³⁸

Thus, it can be seen that the rule of reason which is applicable to all of these limitations on utility installations, the consent, regulatory and "incommode" features, is applied in the following manner in this state.³⁹

(1) Is the regulatory purpose related to the health and safety of the public?

(2) Do the means chosen bear a reasonable relation to the object sought to be accomplished?

(3) Is there a clearly less burdensome way of accomplishing the same result? In considering this factor the courts weigh the magnitude of the evil against the burden imposed.

Accordingly, the Pennsylvania courts have held that a city or borough cannot attach a provision for free lighting to its consent, since such a requirement has no relation to health, safety or public welfare.⁴⁰ Further, while reasonable permit and inspection fees may be attached to the grant of consent, the fee must bear a proper relation to the reasonable cost of inspection.⁴¹ On the other hand, the requiring of street permits prior to installation or repair has been invariably sanctioned⁴² provided no unreasonable conditions are attached to the grant of the permit.⁴³ Further, in the interest of public safety reasonable restrictions may be imposed with respect to the situs of pole installations in the highways and streets.⁴⁴ And in urban areas where the safety hazards are great, the courts have sanctioned orders requiring underground installations and the removal of all poles and overhead wires.⁴⁵

37. *Taylor Borough v. Postal Telegraph & Cable Co.*, 192 U.S. 64 (1904); *Kittanning Borough v. Kittanning Consolidated Gas Co.*, 26 Pa. Super. 355 (1904).

38. See note 29 *supra*.

39. *Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634 (1954). In that case Chief Justice Stern clearly set forth the test applied to police power cases in Pennsylvania.

40. *Scranton Electric Light & Heat Co. v. Scranton*, 1 Lack. Jur. 177 (C.P. Pa. 1889).

41. *Edgewood Borough v. Scott*, 29 Pa. Super. 156 (1905); *Ridley Park v. Light & Power Co.*, 9 Pa. Super. 615 (1899).

42. *Lansdowne Borough v. Springfield Water Co.*, 16 Pa. Super. 490, 496 (1901).

43. *Central District & Printing Telegraph Co. v. Homer City*, 242 Pa. 597, 89 Atl. 681 (1914).

44. *A.T. & T. Co. of Pennsylvania v. Mill Creek Twp.*, 195 Pa. 643, 46 Atl. 140 (1900).

45. Compare *Duquesne Light Co. v. Pittsburgh*, 251 Pa. 557, 97 Atl. 85 (1916) with *A.T. & T. Co. of Pennsylvania v. Mifflintown Borough*, 15 D & C 575 (C.P. June 1930).

However, the courts have held with equal vigor in Pennsylvania, that a municipality may not, under the guise of regulation, deprive a utility of its franchise to maintain an overhead line along a particular street, offering as a substitute therefor the choice of several alternate routes, any one of which would involve heavy expense, the acquisition of rights-of-way over private property, and serious structural and engineering difficulties.⁴⁶ Using the same reasoning the Supreme Court of Pennsylvania invalidated an ordinance prohibiting the movement of northbound traffic, including street cars, on a city street in order to avoid congestion and danger, under the balancing of equities test.⁴⁷ In so holding the Court stated that "the power to regulate is not the power to destroy. A limitation is not the equivalent of confiscation." Finally the Pennsylvania courts have refused to uphold a flat prohibition against access from an abutting drive to a county road when the burden imposed upon the abutting property owner was great and the safety features slight in comparison to the burden.⁴⁸ The court in so holding recognized, however, that in the interest of public safety reasonable regulations with respect to access from this property other than the prohibitory type invalidated might be sustained.

In the light of these cases it is obvious that the proposed federal regulations could run into problems in Pennsylvania, at least under this legislative scheme, unless some provision is made for off-shoulder installations serviced from roads other than the main roadway, and service from the main way when the "hard case" is presented. However, with such provisions the Pennsylvania scheme would appear to be adaptable to the new changes without any amendments or supplements or new decisional law. No doubt new regulations would be adopted at the state level which would contemplate these changes without any amendment to the basic laws.

For example, it would appear that, except for the "hard case," telephone poles might be removed from the shoulder areas on interstate highways without any great legal difficulties. Considering the high speeds and consequent danger to the motorists, as contrasted to the inconvenience of locating them off the shoulder, it would appear that this provision would be upheld except in unusual circumstances. The same thinking would apply for the provision against indiscriminate access. In some cases an exception might have to be made under controlled conditions—for example, permitting access at specific times

46. *A.T. & T. Co. of Pennsylvania v. Mifflintown Borough*, 15 D & C 575 (C.P. Jun. 1930).

47. *Valley Railways v. Harrisburg*, 280 Pa. 385, 124 Atl. 644 (1924).

48. *Breining v. Allegheny County*, 332 Pa. 474, 2 A.2d 842 (1938).

and through a padlocked gate. Both of these regulations gain added stature if installations are permitted along the off-shoulder areas with access points from roads other than the primary roadway. This makes the utilities' burden less severe without creating any appreciable hazard to the motorist.

Thus, on the basis of this nationwide group survey and from the specific examination of Pennsylvania law, it can be seen that any new regulations along the suggested lines, as qualified, could be satisfied by the several states within the framework of existing laws.

II.

ACCEPTANCE OF FEDERAL-AID PROVISIONS.

Every state has enacted legislation of one sort or other accepting the fruits, as well as the required conditions, of federal aid.⁴⁹ Fundamentally, the language of all these statutes is essentially the same though they can be broken down into three distinct groups, with some states passing more comprehensive and detailed acts than others. However, an analysis of these statutes reveals that even the less detailed ones are fully adequate to meet any *reasonable* conditions attached to federal aid.

The more detailed pronouncements, which have been enacted in the majority of states, contain the following four provisions:⁵⁰

1. A formal assent is given to the receipt of federal aid under the 1916 law, and a continuing assent is given to all future federal-aid laws;
2. A designated administrative head, usually the Highway Engineer, is given the power to enter into contracts with the federal government to effectuate such grants in aid;
3. The administrator is given the power to do all things necessary to obtain the benefits of federal aid, including compliance with any conditions, rules or regulations attached thereto, and including the power to enact rules and regulations to satisfy any such conditions;
4. The state's good faith is pledged to provide sufficient funds to meet the requirements of federal aid.

49. See APPENDIX A of this Article for all state statutes dealing with this question.

50. Appendix A: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

There is a little doubt that if ever legislation was designed to meet any and all *reasonable* federal regulations attached to grants-in-aid, this legislation is so designed. And if anything more specific could be desired it is found in the second group typified by the California, Georgia and Rhode Island statutes.⁵¹ The California and Georgia acts provide that federal law is to govern in case of conflict, and that any inconsistency in state law with federal laws, rules or regulations will render the state law inapplicable to that extent. The Rhode Island statute provides that the provisions of state law concerning the building, improvement and maintenance of state roads and bridges is not to be construed in any manner as to prevent the receipt of federal aid. However, it might be noted that no court would interpret these statutes so as to permit these states to blindly follow any and all federal regulations but would require them to be reasonable.

The Pennsylvania statute deviates somewhat from this pattern and provides that the continuing assent shall not diminish any powers conferred on the State Highway Department.⁵² However, on closer examination, the Pennsylvania statute also is specifically available as a basis for meeting reasonable new federal regulations. This provision is part of the State Highway Act and was enacted at the same time as the most recent amendment to the subject-matter provision for utility regulation on state highways. Therefore, the Legislature intended this assent section to be available as a basis for satisfying federal regulations so long as this did not diminish any powers conferred in the utility regulation section. Since the utility regulation section gives the State Highway Department the power to attach reasonable conditions to the installation and maintenance of utility facilities, it is obvious that the two provisions are complementary and in full accord.

Although part of the majority group, the Arizona and Indiana statutes⁵³ are worthy of specific mention because each contains an additional feature not found in the other states comprising this group. As noted earlier, Arizona permits certain specified utilities to occupy its streets and highways "without limitation." It was pointed out that this might pose an obstacle to the use of enabling acts and regulatory legislation as a basis for complying with federal regulations. However, as a part of the federal assent portion of Arizona law the State Engineer is given power to prescribe rules and regulations to govern the use of state highways in the interest of public safety and convenience. This

51. See APPENDIX A.

52. *Ibid.*

53. *Ibid.*

proviso would appear to cast aside any fears and bring Arizona into the fold with the rest of the states.

Indiana, in addition to being part of the majority which have enacted the four-pronged assent legislation already discussed, had added a further provision.⁵⁴ It gives the administrator the usual power to cooperate with the federal government, but only "to the full extent allowed by the Constitution of Indiana and not prohibited by law." At the outset this might appear to be restrictive but in reality it is simply saying specifically what the courts no doubt would say by decision in other states, at least to the extent that the federal conditions being assented to must be reasonable. Further, when it is recognized that Indiana, like Pennsylvania, has a subject-matter permit and regulation statute providing for reasonable regulation,⁵⁵ that state will have no problem harmonizing its assent provision to state law and thus utilizing it as a method of complying with any reasonable federal regulations.

Finally, more limited and less comprehensive assent provisions are found in a small group of states. The statutes are short, and simply provide a continuing assent to federal-aid acts, and in some cases also give the designated administrator the power to enter into contracts with the federal government to effectuate such aid. Such statutes are in effect in Missouri, New Hampshire, New Jersey, New Mexico, New York and Oklahoma.⁵⁶ However, though less specific, these statutes can also be utilized for regulation purposes. They all clearly assent to the federal-aid acts, and the requirement of compliance with attached conditions is a part of these acts. Further, the ability to enter into contracts to effectuate such aid contemplates the power to satisfy any reasonable conditions attached to all such contracts.

Thus, in the absence of a violation of special state constitutional or statutory provisions, such as notice requirements in titles or prohibitions against implied amendment, these statutes constitute a panacea for meeting the requirements of the proposed federal regulations. They clearly constitute the most desirable method of meeting new standards. Although the more comprehensive enabling-act provisions and regulatory schemes are specifically addressed to utility occupancy and have formed the basis for state regulation in the past, they are basically a hodge-podge of individually enacted statutes involving constant overlapping and inconsistencies. True, when the entire conglomeration is thrown into the "pot" and boiled it simmers down to a right of occupancy for all utilities subject to reasonable regulation. However, it

54. *Ibid.*

55. *Ibid.*

56. *Ibid.*

requires a great deal of boiling first. Hence, in applying these suggested regulations to particular situations the court would have to examine the particular enabling act, the restrictions imposed thereon and the applicable case law.

On the other hand the assent provisions are the only state acts specifically addressed to the question of satisfying federal-aid conditions. Under these statutes the courts would simply have to look at one statute and decide if the legislature intended that its provisions should apply to utility occupancy in the light of the franchise grants and regulatory provisions pertaining to them specifically, and if so, whether the state compliance was reasonable. That is the issue which would be presented in each state, although the answer to the first part of the issue would be rather obvious in California, Georgia and Rhode Island. If they were found to be applicable it would be a desirable result from the standpoint of expediency since the one statute would cover all utilities and would be completely elastic and adjustable to any future changes in federal requirements. Other than the issue noted the only other objection to their utilization by the individual states might be on constitutional grounds. Frequently found in state constitutions are provisions prohibiting the concealment of veiled subject matter in the body of a statute which is not set forth in the title and provisions barring the inclusion of more than one subject matter in a single statute.⁵⁷ In addition there is an abundance of case law to the effect that in construing statutes, amendment by implication of important legislation will never be permitted unless there is no other reasonable hypothesis for the provisions.⁵⁸ Such a decision might be applicable when dealing with those states granting occupancy rights to certain types of utilities without any provision for regulation. However, it would appear that all of these potential hurdles can be cleared and that these enactments can form the basis for compliance with any new regulations without amendment or supplement. Of course, such a statement must always be premised on the supposition that the regulations will be reasonable. However, if such were not the case, they could be attacked at the federal level as well.⁵⁹ Further, if the suggested analysis of the Secretary's position is correct the regulations would not appear to be unreasonable, particularly with a provision added for the "hard cases" and off-shoulder occupancy.

57. See PA. CONST. art. III, § 3.

58. *Evans v. West Norristown Twp.*, 370 Pa. 150, 87 A.2d 474 (1952); Commonwealth *ex rel. Lyons v. Day*, 177 Pa. Super. 392, 110 A.2d 871 (1952); *Wilkes-Barre v. Pennsylvania P.U.C.*, 164 Pa. Super. 210, 63 A.2d 452 (1949).

59. *C.I.R. v. Clark*, 202 F.2d 94 (7th Cir. 1953); *Hygrade Food Products Corp. v. Reconstruction Finance Corp.*, 196 F.2d 738 (1952).

III.

CONTROLLED-ACCESS LEGISLATION.

There are four significant things to remember about this type of legislation:

1. It is found in one form or another in every state of the union;⁶⁰
2. The impetus for its enactment or the revision and codification of existing access legislation was the federal provision for access control and the prohibition against roadside establishments for serving motorists;
3. It has two aspects of control, the limitation of access and in some states the control of commercial establishments;
4. If the former applies at all to utility occupancy, it applies only to the question of utilization of the main way as a service road to adjacent facilities. On the other hand, in states having the "commercial enterprise" prohibition, if that prohibition applies at all, it means an absolute prohibition against utility occupancy of any part of the right-of-way of a road designated as "controlled access." Obviously, the courts are going to require some rather clear expression of legislative intent before construing these provisions in that manner in the light of the long-standing permission to occupy and the statutory duty to serve the public.⁶¹

Much of this legislation is of recent origin, having been occasioned, as noted, by the 1956 Federal-Aid Highway Act provision mentioned. Specifically, that Act provides that all agreements between the Secretary of Commerce and the various state highway departments for construction of projects on the Interstate System shall contain a clause providing that the states will not add any points of access to, or exit from the project except for those approved by the Secretary in plans for the project, without prior approval of the Secretary. This same section requires a clause in all such agreements prohibiting "automotive service stations or other commercial establishments for serving motor vehicle users to be constructed or located on the right of way of the Interstate System."⁶²

Consequently, there followed a wave of state legislation on the subject, although one doubts if such was necessary in the light of the "acceptance of aid" provisions then existing in all states. However, the stimulus for specific legislation was no doubt the fact that this legislation had a decided impact upon private, vested, property rights—the

60. See APPENDIX B of this Article for all state statutes dealing with this question.

61. *Pennsylvania Electric Co. v. Morrison*, 354 Pa. 472, 47 A.2d 810 (1946); *Borough of Ambridge v. Public Service Commission*, 108 Pa. Super. 298, 165 Atl. 47 (1933).

62. See note 11 *supra*.

abutting owner's right of access, recognized at common law.⁶³ Contrast that with the equally well-established but non-vested utility *license* to occupy the highways and you see why there is not the same need for public legislation to meet reasonable conditions.

These statutes designate controlled-access highways by various titles, the most common being "controlled-access facility," and "limited-access facility." In spite of the wide range of names the vast majority are substantially similar to the Model Act which was drawn up to cover this subject. The Model Act provides as follows:

"Sec. 2. Definition of a controlled-access facility. For the purposes of this act, a controlled-access facility is defined as a highway or street especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or easements or only a controlled right or easement of access, light, air, or view by reason of the fact that their property abuts upon such controlled-access facility or for any other reason. Such highways or streets may be freeways open to use by all customary forms of street and highway traffic; or they may be parkways from which trucks, busses, and other commercial vehicles shall be excluded."⁶⁴

It is obvious upon reading the act that the issue for purposes of this discussion on the access-control phase of these statutes is simply whether or not utilities are "owners or occupants of abutting lands or other persons" within the access prohibitions of the act. It would appear that they are not.

This phrase is frequently used in statutory language and has become a word of art. It is usually construed as including owners of abutting land or their tenants.⁶⁵ The "other persons" refers to assignees, adverse possessors, squatters and the like who are in active possession without property rights. Since the utilities occupy the highways under a license they are certainly not "owners." And equally so they are not "occupants" as that phrase has come to be known. The usual definition is found in *Quist v. Duda*,⁶⁶ in which Chief Justice Simmons of Nebraska defined an "occupant" as:

"One who occupies; an inhabitant; especially one in actual possession, *as a tenant*, who has actual possession, in distinction from the landlord who has legal or constructive possession."

63. Cunnynggham, *The Limited-Access Highway From a Lawyer's Viewpoint*, 13 Mo. L. Rev. 19, 22 (1948); LEVIN, PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT 1-98 (1947); Kane v. Metropolitan Elev. Ry. Co., 125 N.Y. 164, 26 N.E. 278 (1891); Egerer v. New York Central & H.R.R. Co., 130 N.Y. 108, 29 N.E. 95 (1891).

64. See Levin, *op. cit. supra*, note 63 at the Appendix A.

65. Leone v. Bilyear, 361 Mo. 974, 238 S.W.2d 317 (1951); Bixler v. Hagan, 42 Mo. 367 (1868); Quist v. Duda, 159 Neb. 393, 67 N.W.2d 481 (1954).

66. 159 Neb. 393, 67 N.W.2d 481 (1954).

There is significance to be attached to the reference to inhabitant and tenancy, as well as the statutory reference in these limited access statutes to the deprivation of the right of access, light, air or view. All of these obviously are concerned with vested occupancy of an abutting dwelling. In fact one of the important legal questions surrounding this type of legislation has been whether or not such an owner or occupant has a right to redress for the loss of these common-law, vested rights,⁶⁷ and whether such legislation is constitutional if provision is not made for compensation for the loss of these rights.⁶⁸ But none of these important signposts point in any way to utility occupancy. Further, and significantly, the federal provision which gave impetus to this legislation does not apply to utility access and this is best shown by reason of the Secretary's statement with respect to a need for such legislation in the future.⁶⁹ Hence, it is apparent that neither Congress nor the state legislatures were addressing themselves to this question in enacting this legislation.

Finally, and of greatest significance, the very fact *that access to the highway* is being controlled is the clearest indication that such legislation is addressed only to the question of a crossing of that intangible line which separates the adjacent or abutting properties from the highway right of way. Since the off-shoulder areas are part of the highway it would be incongruous to control access to the same highway by parties who are already on it and hence are not required to cross that intangible line which designates the point of access.

In addition to the access prohibition eight statutes contain a prohibition against "commercial enterprise or activities" in some form or other.⁷⁰ The additional issue in those states is whether or not a public utility is a "commercial enterprise or activity" within the meaning of these statutes. The answer again appears to be *no*. This issue is not present in Maine and Georgia which have the prohibition but have worded it so as to specifically preclude any possible association of utility facilities with the term "commercial enterprise."⁷¹

As a matter of interpretation it is equally clear that utilities are not contemplated by the New Mexico, Tennessee and Vermont statutes⁷² as they are all addressed to "competitive commercial establishments for serving motor vehicle users," which is virtually identical with the language of the 1956 Federal-Aid Act, and obviously does not

67. See note 63 *supra*.

68. The Pennsylvania Act was declared unconstitutional on that very ground, *Creasy v. Stevens*, 160 F. Supp. 404 (C.W.D. Pa. 1958).

69. See note 12 *supra*.

70. Georgia, Maine, New Hampshire, New Mexico, North Carolina, Pennsylvania, Tennessee, and Vermont.

71. See APPENDIX B.

72. *Ibid*.

refer to utility establishments. The states not having such provisions comply with this federal condition by virtue of the powers given by statute to the administrator. That raises the question of just what the states having the prohibition are seeking to exclude. The answer is "ribbon development," and this is well illustrated by a dramatic portrayal of just what happens to a major roadway when there is no such prohibition.

In an article appearing in the *Maryland Law Review*⁷³ Robert R. Bowie pointed up the need for these prohibitions as follows:

"The thread of commercial exploitation along the newly completed Ritchie and Philadelphia highways has recently focused public attention on the problems of unrestricted roadside development, but the problem itself is not new. For many years, as traffic has increased, the blight of such development has spread unimpeded along the main traffic arteries of the State. Gasoline stations, lunch rooms, stores, dance-halls, billboards and other commercial establishments have multiplied until in extreme cases, such as the Baltimore-Washington Boulevard, they stretched practically in unbroken series along the whole length of the highway."

That is the kind of "commercialism" that these statutes are trying to curb. To equate a state-franchised, highly regulated public utility having a statutory duty to provide service to the public with a hot dog stand is an intention that has never been attributed to a legislature.

This brings us to an analysis of the Pennsylvania and New Hampshire enactments⁷⁴ which have no qualifying language attached to their prohibition against "commercialism." In New Hampshire there is a dictum from an advisory opinion which casts some light on that statute. Section 8 of the New Hampshire Limited-Access Highway Act forbids the authorization of "commercial enterprises or activities" on limited-access highways.⁷⁵ In an *Opinion of the Justices*⁷⁶ the question propounded to the Justices related to the constitutionality of an amendment allowing established business facilities, abutting or having direct access upon a newly designated limited-access highway, to retain locations and access when it became a toll-free limited access highway, and denying all rights of access to neighboring abutting owners who had not so developed their land. The Justices were of the opinion that such alleged discrimination was authorized by the

73. Bowie, *Limiting Highway Access*, 4 Md. L. Rev. 219 (1940). It is noteworthy that Mr. Levin, Professor Huber, and all the other writers who analyzed the reasons leading to this legislation, never considered utilities as causing these problems. The cause was always attributed to "ribbon development."

74. *Ibid.*

75. *Ibid.*

76. 99 N.H. 505, 105 A.2d 924 (1954).

amendment to the access act, and that it was constitutional because it was reasonably related to the valid public purpose of preventing further spread of such development. Of importance for this discussion is the fact that the court in so holding, gave some indication that they considered the commercial prohibition as applying to the ribbon type development. The language in question reads as follows:

"A further question may be thought to be presented as to whether the provisions of [the amendment] . . . necessarily produce an unconstitutional discrimination against the owners of properties which abut the toll-free section of the limited access highway, but have not been developed into going business establishments and will be deprived of rights of access, air, light or view, upon establishment of the turnpike"

The Justices then pointed out that the advisory opinion was not binding upon the question of vested rights possessed by the abutting owners. Although far from a choice case, it associates, by implication, in the court's mind, the "ribbon" type of abutting "business establishments" and vested property interests with limited-access legislation. It is also worthy of mention that no public utility joined with the dissenting group of intervenors who feared that their rights might be affected by the advisory opinion.

Since the language of the Pennsylvania statute is virtually identical, this same reasoning could be applied to that enactment. Further, and like New Hampshire's, the Pennsylvania Act provides for the establishment of local service roads; it then goes on to say that these roads should be located so as to permit the establishment "of adequate fuel and other service facilities for the users of the limited-access highway." This sentence is then followed by the prohibition against commercial enterprises and activities. This indicates that the prohibition is referring to the same type of business as that narrowly excepted in the prior sentence. That interpretation becomes more persuasive when it is considered that both provisos are found in the same section of the Act. A logical interpretation in the light of the rules of statutory construction, and the comprehensive Pennsylvania utility regulatory scheme found in other acts, is that the legislature first provided for the necessary off-the-road gasoline, dining, and rest facilities because it was going to exclude similar enterprises from the traveled portion of the right-of-way in the very next sentence.

When it is again considered that the impetus for such legislation was the wave of ribbon development and the federal prohibition against commercial establishments, there is little doubt that this provision was not meant to apply to utilities and should not be used to *prevent* the

Commonwealth from complying with the new federal conditions—*prevent*, advisedly, because the regulations suggested by Secretary Weeks⁷⁷ clearly contemplate the use of the right of way for utility installations, within the limits of access control. Further, an examination of some of the case-law definitions of “commercial enterprise” emphasizes that the term “utility facility” connotes industrial rather than business or commercial development.⁷⁸ Even that title is not quite descriptive—in a word, public service companies are a class by themselves and are usually referred to specifically when enacting permissive or restrictive legislation applicable to them. This is shown by the specific enabling acts; the specific utility regulation provisions in state highway laws and the fact that in zoning legislation utility facilities are not placed in any of the usual classifications but are invariably specifically prohibited or permitted in a given zone.⁷⁹

With respect to case-law definitions of the phrase most of the decisions make no distinction between the words “commercial enterprise” and “commercial activity.”⁸⁰ The courts use the terms interchangeably without identifying one or the other with a particular individual definition.

Most of the Pennsylvania cases involving an interpretation of the phrase arise over the question of eligibility for the charitable-institution tax exemption,⁸¹ and hence are not direct authority. In spite of the long-standing legal maxim that tax exemptions are to be strictly construed the courts have given a narrow definition to the words, thus enabling many activities which are clearly of a business nature to come within the tax exemption by labelling them as non-commercial enterprises. For example, in *Y. M. C. A. of Pittsburgh Tax Case*,⁸² the court held that the “Y” was not a “commercial activity” in spite of the fact that it conducted in the same building with the dormitories, a restaurant, food service center, bowling alleys, barber shops and businessmen’s health clubs. Contrast that with a public utility which is

77. See note 12 *supra*.

78. See *Littlehales v. District of Columbia*, 130 F.2d 402, 403 (D.C. Cir. 1942) (used terms “business” and “commercial activity” interchangeably); *District of Columbia v. Wardell*, 12 F.2d 202 (D.C. Cir. 1941) (used terms “business” and “commercial activity” interchangeably); *Jones v. Johnson*, 55 S.E.2d 904, 906 (Ga. 1949) (words “commercial purposes” identified with sale of goods and merchandise); *Murdoch v. City of Norwood*, 67 N.E.2d 867, 869 (Ohio 1946) (word “business” associated with retail establishments); *Jones v. Rezzetono*, 92 Pgh. L.J. 369 (C.P. Ally. 1944) (auto-body shop not commercial).

79. See, for example, *City of Philadelphia Zoning Laws* of 1957.

80. See *Plumby v. Philadelphia School District*, 182 Pa. Super. 122, 126 A.2d 678 (1956); *Philadelphia Suburban Water Co. v. Pennsylvania P.U.C.*, 168 Pa. Super. 360, 78 A.2d 46 (1951).

81. See *West Indies Mission Appeal*, 387 Pa. 534, 128 A.2d 773 (1957); *Y.M.C.A. of Pittsburgh Tax Case*, 383 Pa. 176, 117 A.2d 743 (1955).

82. 383 Pa. 176, 117 A.2d 743 (1955).

restricted in its financial and accounting methods to a prescribed system of accounts; restricted in its contractual powers by a regulatory commission's passing upon virtually all its agreements; and finally and foremost, its inability to put a price tag on its cost of service which is arrived at by virtue of the rate-making process; and you see that even the "Y" has more extensive business-type aspects than a utility.

Finally, in addition to the usual constitutional question surrounding the limitation on access which has recently resulted in an invalidation of this act, on that ground, such an interpretation would raise serious constitutional questions in Pennsylvania since the title of the act has no reference whatsoever to any prohibitions against "commercial enterprise" or any regulatory or exclusionary features whatsoever.⁸³ It would also encounter difficulties on the question of duality of subject matter.⁸⁴ In addition, it would constitute an implied amendment to all the utility enabling acts without any notice in the title.⁸⁵ Hence, in the light of all the factors discussed it would be somewhat astonishing if any court would interpret such a provision as applying to utilities.

IV. CONCLUSION.

The purpose of this article was to determine if amendments or supplements to state laws would be necessary in order to carry out the mandate of anticipated federal regulation with respect to utility installation on the Interstate Highway System. The answer is "no," so long as the regulations follow the pattern set forth in the article. If the regulations follow the predicted form the states have two hooks to hang their hats on—the comprehensive utility regulatory and enabling acts found in all states and the assent to federal-aid conditions which have also been enacted by all 48 states. The latter class of legislation is simple, all inclusive, and elastic, and would appear to be a most desirable method of making any adjustments in existing state policy with respect to the question of occupancy by utility facilities. It is highly improbable that the access provisions of state controlled access legislation could be utilized for this purpose. And it is even more improbable that the commercial enterprise provisions found in several states could be utilized in any way in restricting or excluding utilities.

83. See Act of May 29, 1945 Pub. L. No. 1108. Also see footnote 68 *supra*. Apparently the entire Act was declared invalid in spite of the separability clause on the theory the Legislature would not want it to stand with the backbone of the Act being unconstitutional, at least with respect to the fact situation presented.

84. See *Stewart v. Hadley*, 327 Pa. 66, 74, 193 Atl. 41 (1937); *Wilkes-Barre v. Pennsylvania P.U.C.*, 164 Pa. Super. 210, 63 A.2d 452 (1949).

85. *Ridge Avenue Pass. Ry. Co. v. Philadelphia*, 124 Pa. 219, 16 Atl. 741 (1889); *Wilkes-Barre v. Pennsylvania P.U.C.*, 164 Pa. Super. 210, 63 A.2d 452 (1949); *Commonwealth ex rel. Reno v. Heidelberg Twp.*, 48 D & C 511 (C.P. Dauph. 1943).

APPENDIX A

Assent to Federal Aid Legislation

State

Alabama	ALA. CODE ANN. tit. 23, § 32.
Arizona	ARIZ. CODE ANN. § 18-106(5), (7) and (15).
Arkansas	ARK. STAT. § 76-522.
California	CAL. STREETS & H'WAYS CODE § 820 (West).
Colorado	COLO. REV. STAT. ANN. § 112.
Connecticut	CONN. GEN. STAT. § 2260.
Delaware	DEL. CODE ANN. tit. 17, § 422.
Florida	FLA. STAT. ANN. § 339.02.
Georgia	G.A. CODE ANN. § 1618.
Idaho	IDAHO CODE ANN. tit. 40-2401, § 2.
Illinois	ILL. ANN. STAT. c. 121, §§ 257-265, 292 (Smith-Hurd).
Indiana	IND. ANN. STAT. §§ 36-127, 2953.
Iowa	IOWA CODE ANN. §§ 307.6, 307.7, 310.1(4), 310.2, 313.1.
Kansas	KAN. GEN. STAT. ANN. § 1-7.
Kentucky	KY. REV. STAT. ANN. § 176.240.
Louisiana	LA. REV. STAT. §§ 48:161, 48:164, 48:203.
Maine	ME. REV. STAT. ANN. c. 23, §§ 15, 17, 18.
Maryland	MD. ANN. CODE art. 89B, § 76(1), (2).
Massachusetts	MASS. ANN. LAWS c. 81, §§ 29A, 30.
Michigan	MICH. STAT. ANN. § 9.831.
Minnesota	MINN. STAT. ANN. c. 160, § 160.12.
Mississippi	MISS. CODE ANN. § 8038(s).
Missouri	MO. STAT. ANN. § 226.190.
Montana	MONT. REV. CODES ANN. §§ 32-1606, 32-1609.
Nebraska	LEGISLATIVE BILL 187, §§ 4, 5.
Nevada	NEV. REV. STAT. §§ 408.245, 408.250.
New Hampshire	N.H. REV. STAT. ANN. §§ 239:1, 239:6.
New Jersey	N.J. STAT. ANN. §§ 27:8-1, 27:8-6, 27:12B-5.
New Mexico	N.M. STAT. ANN. §§ 55-3-19, 55-3-20, 55-2-20, 55-2-26.
New York	N.Y. STREETS & H'WAYS Bk. 24, art. IV, § 80.
North Carolina	N.C. GEN. STAT. §§ 136-35, 136-18(1)
North Dakota	N.D. REV. CODE § 24-0401.
Ohio	OHIO REV. CODE ANN. § 5531.02.
Oklahoma	OKLA. STAT. ANN. tit. 69, §§ 30.1, 43(d).
Oregon	ORE. REV. STAT. §§ 11.402, 406, 407, 412, 615.
Pennsylvania	PA. STAT. ANN. tit. 36, §§ 670-1005, 670-1006.
Rhode Island	R.I. GEN. LAWS ANN. c. 75, § 29.
South Carolina	S.C. CODE § 33-2.
South Dakota	S.D. CODE § 28.0201.
Tennessee	TENN. CODE ANN. §§ 54-301, 54-302.
Texas	TEX. REV. CIV. STAT. ANN. art. 6674(d), 6672.
Utah	UTAH CODE ANN. §§ 27-5-1—27-5-4.
Vermont	VT. STAT. 5004-10.
Virginia	VA. CODE ANN. §§ 33-12(5), 33-130.
Washington	WASH. REV. CODE c. 47.04, 47.050.
West Virginia	W. VA. CODE ANN. § 1455.
Wisconsin	WIS. STAT. ANN. § 84.-15.
Wyoming	WYO. COMP. STAT. ANN. § 48-109.

APPENDIX B

State Controlled Access Legislation

<i>State</i>	<i>Controlled Access Legislation</i>	<i>Designation for Controlled Highways</i>	<i>Commercial Prohibition</i>	<i>Statute</i>
Alabama	Yes	Limited Access Highway	No	ALA. CODE ANN. tit. 36, § 1.
Arizona	Yes	Controlled Access Highway	No	ARIZ. REV. STAT. ANN. vol. 9, § 28-602.
Arkansas	Yes	Controlled Access Facility	No	ARK. STAT. ANN. § 76-2203-10.
California	Yes	Freeway	No	CAL. STREETS & H'WAYS CODE §§ 24, 100.1-3 (West).
Colorado	Yes	Freeway	No	COLO. REV. STAT. ANN. c. 143, § 144.
Connecticut	Yes	Parkways & Freeways	No	CONN. GEN. STAT. tit. 16, c. 107, § 2257(b); c. 143, § 144.
Delaware	Yes	Controlled Access Highway	No	DEL. CODE ANN. tit. 17, §§ 171-179.
Florida	Yes	Limited Access Facility	No	FLA. STAT. ANN. §§ 338.01-338.21, 334.03(9).
Georgia	Yes	Limited Access Highway	Yes	GA. CODE ANN. §§ 95-1701a, 95-1702a, 95-1707a.
Idaho	Yes	Controlled Access Facility	No	IDAHO CODE ANN. tit. 40-110, § 133; tit. 40-2610.
Illinois	Yes	Expressway; Superhighway	No	ILL. ANN. STAT. c. 34, § 57p (Smith-Hurd).
Indiana	Yes	Limited Access Facility	No	IND. ANN. STAT. § 36-3102.
Iowa	Yes	Controlled Access Facility	No	IOWA CODE ANN. §§ 306A.1-306A.9.
Kansas	Yes	Controlled Access Facility	No	LAWS OF KANSAS 1957, § 5. LAWS OF KANSAS 1953, c. 307.
Kentucky	Yes	Limited Access Facility	No	KY. REV. STAT. §§ 177.010-177.380.
Louisiana	Yes	Limited Access Facility	No	LA. REV. STAT. § 313.
Maine	Yes	Controlled Access Highway	Yes	ME. REV. STAT. c. 23, § 9.
Maryland	Yes	Controlled Access Arterial Highway; Freeway	No	MD. ANN. CODE art. 89B, §§ 32, 33, 165.
Massachusetts	Yes	Limited Access Highway	No	MASS. ANN. LAWS § 81:7c.
Michigan	Yes	Limited Access Highway	No	MICH. COMP. LAWS § 252.51. MICH. STAT. ANN. § 9.1094.
Minnesota	Yes	Controlled Access Highway	No	MINN. LAWS OF 1957, c. 864.
Mississippi	Yes	Controlled Access Facility	No	MISS. CODE ANN. c. 314, § 1819.
Missouri	Yes	No Term-General Power Over Highways is Broad Enough	No	MO. REV. STAT. § 227.250.

<i>State</i>	<i>Controlled Access Legislation</i>	<i>Designation for Controlled Highways</i>	<i>Commercial Prohibition</i>	<i>Statute</i>
Montana	Yes	Controlled Access Highway	No	MONT. REV. CODES ANN. §§ 32-2001-2010, 32-1625.
Nebraska	Yes	Controlled Access Facility	No	LEGIS. BILL 187-1955, § 27-35.
Nevada	Yes	Limited Access Highway	No	LAWS OF NEV. 1955 c. 86, Assembly #247.
New Hampshire	Yes	Limited Access Facility	Yes	N.H. REV. STAT. ANN. §§ 236.8, 236.1.
New Jersey	Yes	Limited Access Highway	No	N.J. STAT. ANN. §§ 39:4-90.1, 39:4-94.1.
New Mexico	Yes	Controlled Access Facility	Yes	N.M. STAT. ANN. §§ 55-10-1—55-10-10.
New York	Yes	Controlled Access Highway; Thruway	No	N.Y. STREETS & H'WAYS Bk. 24, §§ 3(2), 346.
North Carolina	Yes	Controlled Access Facility	Yes	N.C. SESS. LAWS c. 993.
North Dakota	Yes	Controlled Access Facility	No	N.D. REV. CODE §§ 24-0130, 24A-0102(9).
Ohio	Yes	Limited Access Highway	No	OHIO REV. CODE ANN. tit. 25, § 5511.02.
Oklahoma	Yes	Limited Access Highway Facility	No	OKLA. STAT. ANN. tit. 47, § 121.1(s); tit. 69, § 11.1.
Oregon	Yes	Thruway	No	ORE. REV. STAT. §§ 374.010, 374.030, 374.305.
Pennsylvania	Yes	Limited Access Highway	Yes	PA. STAT. ANN. tit. 36, §§ 239.1—239.6.
Rhode Island	Yes	Freeway	No	R.I. GEN. LAWS ANN. c. 75.
South Carolina	Yes	Controlled Access Facility	No	S.C. CODE vol. 4, § 33-351.
South Dakota	Yes	Controlled Access Facility	No	S.D. SESS. LAWS 1953 H.B. 656.
Tennessee	Yes	Controlled Access Facility	Yes	TENN. CODE ANN. vol. 10, § 54-2001—54-2009.
Texas	Yes	Controlled Access Highways	No	TEX. REV. CIV. STAT. ANN. art. 6674W-1.
Utah	Yes	Limited Access Facility	No	UTAH CODE ANN. vol. 3-27-9-1.
Vermont	Yes	Limited Access Facility	Yes	VT. LAWS 1955 c. 270, § 11.
Virginia	Yes	Limited Access Highway	No	VA. CODE ANN. vol. 6, §§ 33-37, 33-40.
Washington	Yes	Limited Access Facility	No	WASH. REV. CODE §§ 47.52.010, 47.52.040.
West Virginia	Yes	Controlled Access Facility	No	W. VA. CODE ANN. §§ 1474(23)(21), 1721(283).
Wisconsin	Yes	Controlled Access Highway	No	WIS. LAWS vol. 1-1955, c. 270.
Wyoming	Yes	Access Facility	No	WYO. COMP. STAT. ANN. §§ 48-346—48-356.